LEONG CHEE KONG & ANOR

v.

TAN LENG KEE

HIGH COURT MALAYA, KUALA LUMPUR
JAMES FOONG J
[SUIT NO: S5-22-74-1998]
10 AUGUST 1999

CIVIL PROCEDURE: *Striking out - Probate action - Whether plaintiffs could proceed with action having entered caveat and appearance in relation to defendant's uncontested petition for probate - Rules of the High Court 1980, O. 71 r. 40(c) - Whether with entry of plaintiffs' appearance defendant's uncontested petition for probate became a contested matter - Rules of the High Court 1980, O. 71 r. 37(14) - Whether both actions were consolidated in view thereof - Whether probate action could not be struck off in the circumstances*

The defendant filed an uncontested petition for probate ('Probate Petition S4') under O. 71 Rules of the High Court 1980 ('RHC'). The plaintiffs entered a caveat. The defendant wishing to remove the caveat issued a warning to the plaintiffs through the Registrar of the Court. In response to this, the plaintiffs entered appearance. The plaintiffs also commenced a probate action ('Probate Action') but only served the writ on the defendants after the hearing in respect of Probate Petition S4. The plaintiffs also appealed to the Court of Appeal against the decision of the court at the said hearing which was still pending. The defendant applied to the Senior Assistant Registrar to strike out the Probate Action but this was dismissed. Hence the instant appeal.

The defendant claimed that once the plaintiffs filed a caveat and entered appearance, the plaintiffs could no longer proceed with the Probate Action. Further, the decision of the court in respect of Probate Petition S4 bound the plaintiffs and prohibited them from proceeding with the Probate Action. Against this, the plaintiffs argued that the substantive issue in Probate Petition S4, *ie*, whether probate was to be granted or refused, was not argued and decided. Thus, the Probate Action could be used to settle this issue.

Held:

[1] Pursuant to O. 71 r. 40(c) RHC, the plaintiffs were allowed to file a Probate Action even when they had entered a caveat and appearance consequent to a warning.

[2] The Probate Action and the Probate Petition S4 both relate to the same parties, facts and issues. Thus, the Probate Action was consolidated with the Probate Petition S4 when the matter in the Probate Petition S4 became a contested matter upon the entry of an appearance by the plaintiffs under O. 71 r. 37(14) RHC. This was to avoid dual litigation of the same matter and to prevent a challenge to the decision of the court in the hearing of the Probate Petition S4 by another court of concurrent jurisdiction.

[2a] As the actions were consolidated, the judge in the hearing of the Probate Petition S4 had the discretion to hear the matters summarily by virtue of O. 71 r. 38(1) RHC and the decision of the judge bound the parties therein. If the plaintiffs were dissatisfied with the said decision, the process was to appeal and not by way of a rehearing of the Probate Action.

[3] The Probate Action could not be struck off as it was consolidated with the Probate Petition S4.

[Defendant's application struck off with no order as to cost.]

Case(s) referred to:
Lesco Development Corp Sdn Bhd v. Malayan Building Society [1988] 2 MLJ 184 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 71 rr. 37(1), (7), (14), 38(1), 40(c), O. 72

Rules of the High Court [UK], O. 71 r. 37(14), 38

Other source(s) referred to:
Williams, Mortimer & Sunnucks in Executors, Administrators and Probate, 17th edn, p 404
Halsbury's Law of England, 4th edn, para 69, vol 37

For the plaintiffs - MY Goh; M/s Iza Ng Yeoh & Kit
For the defendant - Amarjeet Singh; M/s Zubeda & Amarjeet

Reported by Usha Thiagarajah

JUDGMENT

James Foong J:

Introduction

This case involves a conflict in procedure concerning the application for grant of probate under O. 71 and O. 72 of the Rules of High Court ('RHC'). It arose in the following manner:

In 1996 the defendant filed a petition for probate in the Civil Registry of the High Court at Kuala Lumpur for the estate of one Leong Chee Keong (deceased). It was registered as S4-32-474-96 and assigned to Civil Court 4. For ease of reference I shall hereinafter refer to this application as the "Probate Petition S4". Having wind of this application, the plaintiffs, who are the sole surviving brothers of the deceased, lodged a caveat. The defendant, wishing to remove the caveat caused a warning to be issued to the plaintiffs through the registrar of the court. In response to this, the plaintiffs on 12 November 1997 filed an appearance. Besides this, the plaintiffs also on 9 February 1998 commenced a Probate Action in the High Court at Kuala Lumpur against the defendant. Here they seek *inter alia*: a declaration that the deceased died intestate; that the plaintiffs' are the sole beneficiaries of the deceased's estate; and that the defendant is not entitled to apply for probate under the Probate Petition S4. This action was registered as S5-22-74-1998 (the suit in this case) and fixed before Civil Court 5. Again, for ease of reference, I shall refer this action as the "Probate Action".

Sometime in March and April 1998 there was a hearing before Madam Justice Datin Paduka Rahmah Hussain in respect of the Probate Petition S4. At this hearing a preliminary objection was raised by the defendant to the form and mode of the appearance filed by the plaintiffs in consequence to a warning issued. After considering submissions, the learned judge delivered a decision on 8 September 1998 (the decision of 8 September 1998). She ruled the plaintiffs' appearance invalid and had it struck off. In addition, she ordered a statutory declaration dated 5 November 1996 (because the defendant has claimed that the original will of the deceased was lost and the only documentary proof of the will is a statutory declaration) be admitted as proof of the deceased's will which bequeathed the deceased entire estate to the defendant. Dissatisfied with this decision, the plaintiffs appealed to the Court of Appeal. This appeal is pending.

Soon after the decision of 8 September 1998, the plaintiffs on 24 November 1998 served the writ in the Probate Action on the defendant. Though the plaintiffs have filed this Probate Action earlier, they did not attempt to serve it on the defendant until after the decision of 8 September 1998. This prompted the defendants to apply immediately to strike out this Probate Action. This application is encl. 7 of the Probate Action. Enclosure 7 was first heard before the senior assistant registrar of court 5. She dismissed it and the defendant appealed to the judge in chamber in the form of encl. 20. This is the matter now before me as a rehearing of encl. 7.

As one can observe, out of this conflict between the parties to the claim probate for the deceased's estate there are two actions: the Probate Petition S4 fixed in court 4 and the Probate Action in court 5.

Defendant's Contention

The defendant's grounds for striking out the Probate Action are as follows:

Firstly, she claims that the plaintiffs lack standing and the right to commence this Probate Action. According to her, when the plaintiffs lodged the caveat and entered the appearance they agreed to be bound by any decision arising from the Probate Petition S4; thus the decision of 8 September 1998 which arose out of the Probate Petition S4 binds the plaintiffs and prohibits them from proceeding with the Probate Action. Secondly, upon the filing of the appearance by the plaintiffs in the Probate Petition S4 the matter was deemed contested in accordance with O. 71 r. 37(14) RHC. Since Justice Datin Rahmah Hussain who heard this contested matter did not direct that it should be tried under O. 72 RHC (as is permitted in O. 71 r. 38(1) RHC) the plaintiffs cannot on their volition proceed under O. 72 RHC on which this Probate Action originates. Thirdly, this Probate Action amounts to a collateral attack by the plaintiffs on the decision of 8 September 1998. For these reasons, the defendant contends that the plaintiffs' Probate Action is wrongful, defective, irregular, and an abuse of the court and should be struck off.

The Plaintiffs' Stand

The plaintiffs are of course of a different view. Their stand is basically this: They claim to possess an independent right to bring this Probate Action as provided by O. 71 r. 40(c) RHC. Further, there is no rule to state that the process as set out in O. 71 r. 37 RHC (relating to caveat) must first be completed before commencement of any proceedings under O. 72 RHC. In the alternative, the plaintiffs argued that since their appearance has been set aside, the Probate Petition S4 becomes an uncontested matter. In this condition, the Probate Action can continue to subsist. Thirdly, the plaintiffs assert that the substantive issue in the Probate Petition S4 of whether probate is to be granted or refused, has not been argued and decided; the decision of 8 September 1998 merely declares the plaintiffs' appearance set aside and the statutory declaration be used as proof of the deceased's will. The question of whether the deceased died intestate or with will has yet to be determined. The Probate Action can therefore be used to settle this issue.

Issues

After perusing the arguments above, I perceive the issues of this case to be as follows:

1. can the plaintiffs institute and proceed with the Probate Action after having entered a caveat and subsequently an appearance in the Probate Petition S4?; and

2. does the decision of 8 September 1998 bind the parties?

Analysis

From my observation of the contentions of the parties, I find that there exists a misconception of the procedure applicable to an application for probate. For this, and in order to resolve this dispute between the parties, I feel it is necessary to begin with the basic.

Any person wishing to prove a will for probate can proceed with either: filing a petition under O. 71 RHC as a non-contested matter or a writ under O. 72 RHC as a contested matter. The former is known as proving the will in the common form while the latter is often referred to as the solemn form. There are reasons for the availability of these two modes.

When an applicant expects no objection or challenge to his application then he will normally apply by way of O. 71 RHC, as a non-contested matter *ie*, in the common form. However if he anticipates challenge to his proving of the will then it will be more appropriate to apply under O. 72 RHC, as a contested matter. When a writ is filed under this O. 72 the person expected to challenge the proving of the will be named as the defendant. The major difference in the two methods of approach is, in my view, the consequences. If probate is granted in the common form but is subsequently challenged, and the challenge succeeds, then the probate originally granted will be revoked. But if the will is proved in the solemn form *ie*, by an application made under O. 72, which is a contested matter, then no person who has been a party or privy to the proceedings (or aware of such application and does nothing about it) cannot afterwards put the executor to proof of the will, unless there is evidence of fraud or a latter will has been discovered. The rational for this is that in an application of the solemn form the issue on the interest of the validity of the will has been litigated, and a decision handed down with relevant parties involved, as compared to a will proved in the common form which lacks the qualities of the former and is thus vulnerable to be revoked in a subsequent challenge – see *Williams, Mortimer & Sunnucks in Executors, Administrators and Probate*, 17th edn, p. 404.

Before or after any application for probate is made, whether in the common form or the solemn form, any person wishing to challenge the proof of a will can enter a caveat with the Court Registry. This is provided by O. 71 r. 37 RHC. When a caveat is entered no grant of probate will be made without notice to the caveator until it is removed or ceases to have any effect – O. 71 r. 37(1) & (7) RHC. After a caveat is lodged an applicant for probate can either file a contested petition under O. 72, or request the registrar of the court where the caveat was entered to issue a warning to the caveator. Upon

receiving this warning the caveator has eight days from date of service of the warning to enter an appearance. Upon an appearance being entered in consequence to the warning of the caveat, the matter is deemed to be a contested matter – O. 71 r. 37(14) RHC. And "Every contested matter must then be referred to the judge who may dispose of the matter in the dispute in a summary manner or direct that the provisions of O. 72 shall apply." – O. 71 r. 38 RHC.

Having elaborated on the relevant procedures available, let us now examine the facts of this case in relation to these processes. The defendant has filed an uncontested petition for probate in the common form – the Probate Petition S4. The plaintiffs wishing to challenge it entered a caveat. Besides, the plaintiffs also commenced the Probate Action. On the latter, the defendant takes issue claiming that once the plaintiffs have filed a caveat and entered an appearance to a warning the plaintiffs can no longer be allowed to proceed with the Probate Action. I find this argument of the defendant entirely without merits and contrary to set procedures. Order 71 r. 40(c) RHC is clear when it pronounces that "the commencement of a Probate Action shall, **whether or not any caveat has been entered** operate to prevent the sealing of a grant..." (emphasis added). This phrase alone is sufficient to allow the plaintiffs to file a Probate Action even when they have entered a caveat and appearance consequent to a warning.

The next issue is more delicate. There is no similar r. 37(14) & 38 of O. 71 RHC in the English Supreme Court Practice which considers a matter as contested upon an appearance being entered in consequent to a warning, and such contested matter will be referred to the judge who can either decide it in a summary fashion by a more elaborate process of O. 72 RHC. I highlight this because the procedure and law relating to probate and administration of a deceased person is taken entirely, if not, substantially, from the English law. In England, according to current practice, when an appearance is entered to a warning of a caveat and a Probate Action is filed, the family division where an appearance is filed will transfer its matter to the chancery division of the High Court which handles all probate actions. This matter will then be tried as a contested matter. In Malaysia, though we have different divisions in the High Court at Kuala Lumpur, only the civil division handles all matters relating to probate and administration of a deceased person's estate. At the present moment this division has six courts. It is not uncommon, going by the usual practice on assignment of files for each of the six courts, to have a matter relating to caveat and subsequent appearance thereto fixed before one court while a Probate Action, filed separately, is allotted to another, as is the situation in this case. If one adopts the English practice, which I think is

rational, then the matter in court 4 should be transferred to court 5, since court 5 was to dealing with a contested matter- a Probate Action. But such transfer did not take place nor was there any proposal for such transfer by any of the parties. Here, I find the defendant cannot be at fault. The plaintiffs have filed the Probate Action but did not serve the writ on the defendant until after the decision of 8 September 1998. Thus at the time of the hearing of the Probate Petition S4 the defendant would not be aware of the Probate Action to even suggest such transfer. The matter in the Probate Petition S4 was then heard. It was litigated as a contested matter as declared by O. 71 r. 37(14) RHC which states that "upon an appearance being entered in answer to a warning of a caveat, the matter shall be deemed contested ... ." Now when one examines this contested matter with the Probate Action the following features are exposed: it relates to the same parties, involves the same facts, and engages in the same issues. These are the criteria for consolidation - see *Halsbury's Law of England*, 4th edn, para 69, vol. 37. Confronted with these two actions bearing such characteristics, I am of the view that the Probate Action was consolidated with the Probate Petition S4 when the matter in the Probate Petition S4 became a contested matter upon the entry of an appearance thereto. This approach is very much in line with the principle enunciated in *Lesco Development Corp Sdn Bhd v. Malayan Building Society* [1988] 2 MLJ 184 where it pronounced that "It is undesirable to allow a situation where two different courts would try and determine the same issues arising between the same parties relating to the same subject matter." Further, I would like to stress that if this proposition of consolidation of the two actions is not adopted then there will also not only be dual litigation of the same matter but also a challenge to the decision of 8 September 1998 by another court of concurrent jurisdiction.

When the actions were consolidated, the learned judge in court 4 decided to hear these matters in a summary manner. Such discretion is granted to the learned judge under O. 71 r. 38(1) RHC. And any decision handed down subsequently is in law binding on the parties of the two actions. If one party is dissatisfied with it, as the plaintiffs were, then the process is to appeal; and not by way of re-hearing of the Probate Action.

Conclusion

By my reasoning aforesaid, I find that the Probate Action cannot be struck off; it was consolidated with the Probate Petition S4. Accordingly I have to dismiss the defendant's application but with no order as to cost.